2004

State of Utah v. Mark Workman : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. MARK WORKMAN, Defendant/Appellant.	Case No. 20040972-CA

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT,
UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION OF
THEFT BY RECEIVING STOLEN PROPERTY, A CLASS
A MISDEMEANOR, BEFORE THE HONORABLE FRED D. HOWARD

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JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in its denial of Workman's motion to dismiss or quash bindover on grounds of improper venue? This issue presents a question of law that is reviewed for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994). *See also State v. Green*, 2005 UT 9, 108 P.3d 710; *State v. Cauble*, 563 P.2d 775 (Utah 1977). This issue was preserved in a written motion to dismiss or quash bindover (R. 65-73).

CONTROLLING STATUTORY PROVISIONS

All relevant statutory and constitutional provisions are set forth in the Addenda.

STATEMENT OF THE CASE

A. Nature of the Case

Mark D. Workman appeals from the October 14, 2004, judgment, sentence, and commitment of the Fourth District Court after he entered a conditional plea to theft of stolen property, a class A misdemeanor.

B. Trial Court Proceedings and Disposition

Mark D. Workman was charged by Information filed in Fourth Judicial District Court on February 24, 2000, of theft by receiving stolen property, a second degree felony, in violation of Utah Code Annotated § 76-6-408 (R. 3).

On March 6, 2003, a preliminary hearing was held before the Honorable Fred D. Howard. The State proffered the testimony of Rebecca Roberts and called Detective Todd Mallinson to testify. The trial court found probable cause and bound the matter over for trial. (R. 57).

On April 14, 2003, Workman filed a Motion to Dismiss for Improper Venue or in the alternative Motion to Quash Bindover Order. (R. 65-73). On April 18, 2003, the State filed a Response to Defendant's Motion to Dismiss or Quash Bindover. (R 74-84). On May 8, 2003, a motion hearing was held before the Honorable Fred D. Howard. The court took the motion under advisement. (R. 88).

On May 21, 2003, Judge Howard issued a written ruling denying Workman's motion (R. 90). The trial court specifically concluded as follows: "Noting the facts relative to the incident in question and submitted authorities; the Court is persuaded by Plaintiff's arguments and authorities which the Court adopts and incorporates in this Ruling. Defendant's Motions, therefore, are respectfully denied" (R. 90).

On December 4, 2003, Workman, through his attorney, gave notice of his intent to appeal to the Utah Court of Appeals the decision by the court against Defendant's Motion to Dismiss for Improper Venue, signed by the court on May 4, 2003 (R. 147). On June 22, 2004, the Utah Court of Appeals filed an Order of Dismissal (Case No. 20030992-CA) for failure of Appellant to file the attachments to the docketing statement (R. 157).

On October 14, 2004, entered a "no-contest" plea to theft by receiving, a class A misdemeanor, conditioned upon his right to appeal the denial of his motion to dismiss/motion to quash the bindover (R. 166-169, 170-73). At this time, Workman was also sentenced to 36 months probation, 7 days work diversion in the Utah County Jail, and he was ordered to pay a $525.00 fine and restitution of $2000.00 (R. 175-77). However, the trial court stayed the sentencing order, pursuant to the parties' agreement, until after this appeal (R. 200: 11).

On November 9, 2004, Workman filed a notice of appeal in Fourth District Court (R. 182).

STATEMENT OF RELEVANT FACTS

A. Proffered Testimony of Rebecca Roberts

On December 13, 1999, at about 8:00 a.m., Roberts' 1998 Mitsubishi Mirage was stolen from in front of her house in the Salt Lake County area. Roberts reported the theft to the police on that day. (R. 196:6).

The value of the vehicle, new, was $14,500 and on the date of the theft of the vehicle on December 13, her insurance company valued the vehicle at $9,282. (R. 196:6).

Roberts does not know the defendant, did not give him permission to have the vehicle at any time, and did not give permission for anyone to take the vehicle from her home on the morning of December 13, 1999. (R. 196:6).

B. Testimony of Detective Todd Mallinson

Detective Todd Mallinson has been employed by the Orem Police Department for about 12 years. (R. 196:7). Mallinson worked in the Major Crimes Task Force from September of 1999 to December of 2002. (R. 196:8).

Mallinson was on duty January 7, 2000. (R. 196:8). He was on routine patrol in the area of 1200 West and Center in Orem when he observed a female on the pay phone. "She appeared to be very nervous and quick movement, looking around, just acting suspicious." (R. 196:8). Mallinson set up surveillance across the street to watch when she left. (R. 196:8).

When the female left, she got into a black Mitsubishi Mirage. (R. 196:9). Mallinson began following her when she pulled out. The driver made a wide turn, going through several lanes of traffic onto Center Street and entering the I-15 freeway. The driver proceeded southbound. Mallinson followed her in the slow lane. The driver crossed over the fog line several times and exited the freeway at the 12th South exit in Orem. (R. 196:9).

The erratic driving behavior caused Mallinson to be concerned that the driver was intoxicated or under the influence of narcotics. This concern led him to initiate a traffic stop. (R. 196:9).

The driver exited the freeway at 12th South and proceeded to get right back on the southbound I-15 freeway. The driver pulled over just after the on ramp. (R. 196:9).

Mallinson was in an unmarked car. (R. 196:9). His red and blue lights were in the headlights. (R. 196:10).

During the stop, the driver identified herself as Holly Armstrong. She did not have a driver's license. She could not provide Mallinson with the vehicle registration or proof of insurance. (R. 196: 10). Mallinson indicated to Armstrong that he had run the registration on the vehicle, and there was some concern because the vehicle was not registered in her name. (R. 196: 10).

Mallinson returned to his vehicle and ran routine checks on Armstrong and the vehicle. (R. 196: 10). Dispatch confirmed the vehicle was stolen and listed on NCIC. (R. 196: 10). When Mallinson received this information, he went up to the vehicle, had Armstrong exit the vehicle, and placed her under arrest for possession of a stolen vehicle. (R. 196: 11).

Armstrong was informed of *Miranda* rights. Armstrong waived her rights and stated that she would speak to Mallinson. (R. 196: 11). Armstrong said she received the vehicle from an individual by the name of Mark, and she told Mallinson she did not know his last name. Later Armstrong told Mallinson that she thought the name was Mark Workman. (R. 196: 12).

Mallinson asked Armstrong if she had a phone number for Workman so that he could contact him to verify the story. Mallinson used his cell phone to call Workman and spoke to him about the case. (R. 196: 12). At the time of the phone call, Mallinson believed that Workman was at his residence at 1044 Quail Park Drive in Murray; however, he was not sure that Workman was actually in that location. (R. 196: 14).

Mallinson testified that the phone rang and an individual, a male, answered the phone and when Mallinson asked to speak to Mark Workman the caller said he was Mark

Workman. (R. 196: 13). Mallinson then asked him if he knew a Holly Armstrong and Workman said yes, that he had been friends with Armstrong for three or four months. Mallinson then asked him if he had loaned her a vehicle, the black Mitsubishi Mirage, and Workman said yes he had loaned it to her earlier that day, about five o'clock, in Salt Lake City. (R. 196: 13). Mallinson then asked Workman if he knew the vehicle was stolen. Workman said, no, he did not know the vehicle was stolen. Mallinson asked Workman where he obtained the vehicle from, and Workman said he obtained the vehicle from an individual by the name of Travis. Mallinson asked if Workman knew Travis's last name, and Workman said he believed it started with an M. Workman then proceeded to tell Mallinson that the name that he purchased the vehicle from was on the title, which was in the glove box of the car. (R. 196: 14).

Mallinson found the title in the glove box. (R. 196: 15). The name on the title was Travis Daddow. The title was for a 1979 Volkswagen. The title showed the address of the registered owner as 8915 West 2800 South, No. 3 in Magna. (R. 196: 16). When Mallinson found the title, he further questioned Workman. (R. 196: 16).

Mallinson told Workman the title was for a Volkswagen. Workman responded by saying that he had not got around to looking at the title close. Mallinson then told Workman that if he had purchased a vehicle, he would make sure that the title was to the vehicle that he was purchasing. (R. 196: 16). Workman made no response. Mallinson asked Workman how much he paid for the vehicle, and he told him he had paid a total of $3,600 for the vehicle. Workman said he put $900 down and he still owed the remainder. (R. 196: 18). When Mallinson asked Workman how he could get in touch with Travis, Workman said he did not know, that he believed Travis was in either prison or in jail. (R. 196: 18).

At that point, Mallinson felt that Workman was being evasive and that he did not want to answer any more questions. (R. 196: 16). Workman did not say he would not answer any more questions, rather Mallinson could just tell by Workman's demeanor. (R. 196: 16). When Mallinson first called Workman, he identified himself only as Todd when Workman asked who he was. (R. 196: 17). At that time, he spoke freely. Then about the middle of the conversation, when they started talking specifically about the vehicle, and that it was stolen, Workman asked again who Mallinson was. Mallinson told him he was Detective Todd Mallinson from Utah County Major Crimes, and that is when Mallinson felt like Workman was being a little evasive. (R. 196: 17).

Mallinson asked no further questions and Workman made no further comments. The conversation ended with Mallinson telling Workman that if he needed to talk to him further, he would call him back. (R. 196: 17). Workman indicated that would be okay. (R. 196: 17).

Mallinson then transported the vehicle to the Pleasant Grove Police Department to do an inventory of the vehicle. Armstrong was transported to the police department where she was held temporarily until she was transported to the Utah County Jail. (R. 196: 17).

Under cross-examination, Detective Mallinson testified that in speaking with Armstrong, he determined that she had picked up the car from Workman at his residence in Salt Lake County. (R. 196: 18). Armstrong also told Mallinson that she had picked the car up on the 6th of January at about five o'clock then she had made a few stops and gone to a party. Armstrong also told Mallinson that when he had first observed her on the phone, she was calling Workman because she wanted to keep the car and did not want to go back to Salt Lake. (R. 196: 19).

SUMMARY OF ARGUMENT

Workman asserts that the trial court erred in denying his motion to dismiss or in the alternative to quash bindover for improper venue in that he did not have control or constructive possession of the vehicle in Utah County. Alternatively, Workman also asserts that the trial court erred in denying the motion because the testimony presented shows that every element of the crime charged occurred in Salt Lake County.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING WORKMAN'S MOTION TO DISMISS OR QUASH BINDOVER FOR IMPROPER VENUE

Workman asserts that the trial court erred in denying his motion to dismiss or in the alternative to quash bindover for improper venue in this matter when testimony showed that he did not have control or constructive possession of the vehicle in Utah County. Alternatively, Workman also asserts that the trial court erred in denying the motion because the testimony presented showed that every element of the crime charged occurred in Salt Lake County.

The Sixth Amendment to the United States Constitution that criminal defendants "shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law[.]" Further, Article I, §12 of the Utah Constitution provides that the Defendant shall "have a speedy public trail by an impartial jury of the county or district in which the offense is alleged to have been committed[.]"

In support of these constitutional guarantees, Utah Code Annotated § 76-1-202 provides certain rules of venue. Subsection 76-1-202(1)(b) provides that when elements

of the offense occur in more than one county, the trial may be held in either county. The rule of statutory construction is that a specific provision of law takes precedent over more general provisions. *Southern Utah Wilderness Alliance v. Board of State Lands and Forestry*, 830 P.2d 233, 235 (Utah 1992). Consequently, subsection 76-1-202(1)(g)(iii) is more specific to the crime of theft and must take precedence over subsection (1)(b). Subsection (1)(g)(iii) provides that "[a] person who commits theft may be tried in any county in which he exerts control over the property affected."

A. Workman did not have control of the vehicle in Utah County.

Workman asserts that he relinquished control of the vehicle in Salt Lake County when he loaned the car to Armstrong. (R. 196: 13). Workman asserts that he disposed of the car through a bailment that was established when the possession and control of the car passed from him to Armstrong. *McPherson v. Belnap*, 830 P.2d 302, 304 (Utah 1992). Further, this bailment occurred in Salt Lake County.

In *McPherson v. Belnap*, 830 P.2d 302 (Utah 1992), former condominium lessees sued the lessor to recover for the loss of their personal property that was stored at the condominium. After being asked to leave the premises on short notice, an agreement was arranged that the McPhersons would leave their furniture at the condominium until they found a permanent place to store it. Belnap assured the McPhersons the property would be safe. After vacating the property, the McPhersons had no key or other access to their furniture except through Belnap.

The court in *McPherson* held that "the creation of a bailment requires that possession and control over an object pass from the bailor to the bailee." *Id* at 304. The court further held that "the bailor must actually or constructively deliver the property to

the bailee in such a way as to entitle the bailee to exclude others from possession during the bailment period, including the owner/bailor." The court clarified this holding by stating, "This does not mean that to be a bailment, the bailee must be the only one who has access to the property. The bailee may allow others to access the property without destroying the bailment. The requirement is only that the bailee has the right to exclude all persons not covered by the agreement and to control the property." *McPherson*, 830 P.2d at 305.

Workman asserts that he created a bailor/bailee relationship with Armstrong when he actually delivered the property to her and turned possession and control of the vehicle over to her. The facts show that Workman did not control where Armstrong was going, how she would get there, or agreeing that she could remain there. After leaving Workman, Armstrong told the officer she made a few stops and then attended a party. Armstrong also told Mallinson that when he had first observed her on the phone, she was calling Workman because she wanted to keep the car and did not want to go back to Salt Lake. (R. 196: 19).

B. Workman did not have constructive possession of the vehicle in Utah County.

Workman asserts that he did not have constructive possession of the car in Utah County. In *State v. Layman*, 1999 UT 79, 985 P.2d 911, Layman was convicted of the offenses of possession of a controlled substance with intent to distribute and possession of paraphernalia. There was no evidence showing that Layman had actual possession of either the methamphetamine or the paraphernalia in the pouch carried by a passenger in the vehicle; therefore, the only basis for the conviction could have been that Layman was in constructive possession of the passenger's pouch and its contents. The question was

whether Layman had sufficient control over another person to prove constructive possession of something that person had in her physical possession.

In *State v. Fox,* 709 P.2d 316 (Utah 1985), Fox was charged and convicted of possession of a controlled substance with the intent to distribute after discovering marijuana plants growing in a greenhouse attached to defendant's house. In affirming defendant's conviction, the court concluded that the evidence was sufficient to establish defendant's constructive possession of the marijuana where defendant owned the property and marijuana paraphernalia was found in defendant's bedroom and other rooms in the home. Because the greenhouse in which the marijuana was grown was accessible only through the house, there was a reasonable inference that defendant not only knew of the greenhouse and its contents but also exercised dominion and control over the marijuana growing therein and was responsible for growing the marijuana. The court held that constructive possession is proved by establishing a connection between the accused and the drug sufficient to permit an inference that the accused had both the ability and the intent to exercise dominion or control over it. *Id.* at 319. The court held that in every case, the determination that someone has constructive possession of drugs is a factual determination that turns on the particular circumstances of the case. Further, that among these circumstances must be facts that permit the inference that the accused intended to use the drugs as his or her own. *Id.*

Workman asserts that there was little evidence presented to prove that he had the "ability and the intent to exercise dominion or control" over Armstrong's person in Utah County and that it is unreasonable to infer that he constructively possessed the car. The only fact tending to prove Mark's control over Armstrong is that she called him to let him

know that she would not be bringing the car back to him that evening. (R. 196:19). This simply is not enough.

C. The testimony presented showed that every element of the crime charged occurred in Salt Lake County.

Workman asserts that every element of the crime of theft, by receiving occurred in Salt Lake County. In *State v. Cauble*, 563 P.2d 775 (Utah 1977), Cauble was charged, tried, and convicted of theft in Utah County. Cauble sold three trailers owned by his employer and received a check in payment. He then deposited the check in a bank in Salt Lake County. *Id.* at 776. Cauble's authority as a sales representative was limited to accepting payment, and he was to immediately turn over the payment to the appropriate personnel. *Id.* at 778. The court reasoned that when Cauble formed the intent in Utah County to keep the proceeds from the sale, failed to turn over the check to the appropriate personnel in Utah County, and failed to notify the company that a sale had occurred in Utah County that the elements of the offense were well established by his conduct, and therefore met the statutory requirement. The court held that the conduct of appellant that constituted the elements of the offense was found to have occurred to a "substantial degree" in Utah County; therefore, the venue was properly laid in Utah County. *Id* at 779.

Workman asserts that venue for this trial was improperly laid in Utah County, because the evidence presented in this case shows that for every element of the offense, the conduct of the appellant was found to have occurred to a "substantial degree" in Salt Lake County. The relevant elements of the offense of theft by receiving stolen property are: (1) receiving, retaining, or disposing of an automobile, and (2) knowing that the property had been stolen, or (3) believing that the property probably had been stolen, and

(4) intending to deprive the owner thereof. The testimony presented showed that Workman received the car in Salt Lake County, (R. 196: 14), retained possession of the car in Salt Lake County, (R. 196: 13), and disposed of the car in Salt Lake County (R. 196: 13, 18). In addition, the knowledge or belief that the car was stolen and the intent to deprive the owner of the property occurred at the time of purchase, which occurred in Salt Lake County. (R. 196: 18).

CONCLUSION AND PRECISE RELIEF SOUGHT

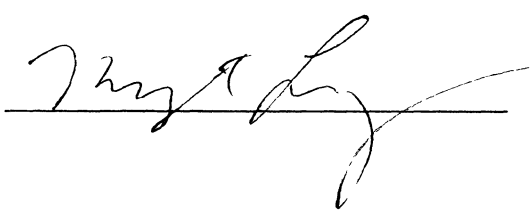
Workman asks that this court reverse the trial court's ruling on the motion to dismiss or in the alternative quash bindover for improper venue, because the evidence presented in this case shows that he did not have control or constructive possession of the vehicle in Utah County. Alternatively, Workman asks that this court reverse the trial court's ruling on the motion because the testimony presented shows that every element of the crime for which he was charged occurred in Salt Lake County.

RESPECTFULLY SUBMITTED this 2nd day of June, 2005.

Margaret P. Lindsay
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered four (4) true and correct copies of the foregoing Brief Of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 2nd day of June, 2005.



ADDENDA

:d prima facie evidence that the person in pos-
:ole the property.
s no defense under this part that the actor has an
n the property or service stolen if another person
an interest that the actor is not entitled to
provided an interest in property for purposes of
ection shall not include a security interest for the
nt of a debt or obligation.
s a defense under this part that the actor:
Acted under an honest claim of right to the
erty or service involved; or
Acted in the honest belief that he had the right
otain or exercise control over the property or
ce as he did; or
Obtained or exercised control over the property
ervice honestly believing that the owner, if
ent, would have consented. 1974

heft — Evidence to support accusation.
nominated theft in this part constitutes a single
acing the separate offenses such as those hereto-
as larceny, larceny by trick, larceny by bailees,
it, false pretense, extortion, blackmail, receiving
ty. An accusation of theft may be supported by
t it was committed in any manner specified in
3-404 through 76-6-410, subject to the power of
ensure a fair trial by granting a continuance or
priate relief where the conduct of the defense
judiced by lack of fair notice or by surprise. 1974

heft — Elements.
ommits theft if he obtains or exercises unautho-
over the property of another with a purpose to
thereof. 1973

Wrongful appropriation — Penalties.
on commits wrongful appropriation if he obtains
nauthorized control over the property of another,
consent of the owner or legal custodian and with
porarily appropriate, possess, or use the property
rarily deprive the owner or legal custodian of
f the property.
nsent of the owner or legal custodian of the
ts control by the actor is not presumed or implied
the owner's or legal custodian's consent on a
asion to the control of the property by any person.
ful appropriation is punishable one degree lower
s provided in Section 76-6-412, so that a violation
l have been:
second degree felony under Section 76-6-412 if it
n theft is a third degree felony if it is wrongful
iation;
third degree felony under Section 76-6-412 if it
n theft is a class A misdemeanor if it is wrongful
iation;
class A misdemeanor under Section 76-6-412 if it
n theft is a class B misdemeanor if it is wrongful
iation; and
class B misdemeanor under Section 76-6-412 if it
n theft is a class C misdemeanor if it is wrongful
iation.
gful appropriation is a lesser included offense of
f theft under Section 76-6-404. 2001

Theft by deception.
son commits theft if he obtains or exercises control
ty of another by deception and with a purpose to
thereof.
by deception does not occur, however, when there
tv as to matters having no pecuniary significance,
in the group addressed. "Puffing" means an exaggerated commendation of wares or worth in communications addressed to the public or to a class or group. 1973

76-6-406. Theft by extortion.

(1) A person is guilty of theft if he obtains or exercises control over the property of another by extortion and with a purpose to deprive him thereof.

(2) As used in this section, extortion occurs when a person threatens to:

(a) Cause physical harm in the future to the person threatened or to any other person or to property at any time; or

(b) Subject the person threatened or any other person to physical confinement or restraint; or

(c) Engage in other conduct constituting a crime; or

(d) Accuse any person of a crime or expose him to hatred, contempt, or ridicule; or

(e) Reveal any information sought to be concealed by the person threatened; or

(f) Testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(g) Take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or

(h) Bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(i) Do any other act which would not in itself substantially benefit him but which would harm substantially any other person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships. 1973

76-6-407. Theft of lost, mislaid, or mistakenly delivered property.

A person commits theft when:

(1) He obtains property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or as to the nature or amount of the property, without taking reasonable measures to return it to the owner; and

(2) He has the purpose to deprive the owner of the property when he obtains the property or at any time prior to taking the measures designated in paragraph (1). 1973

76-6-408. Receiving stolen property — Duties of pawnbrokers [Effective until January 1, 2005].

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:

(a) is found in possession or control of other property stolen on a separate occasion;

(b) has received other stolen property within the year preceding the receiving offense charged;

(c) being a dealer in property of the sort received, retained, or disposed, acquires it for a consideration which he knows is far below its reasonable value; or

(d) if the value given for the property exceeds $20, is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise

tative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:

(i) certify, in writing, that he has the legal rights to sell the property;

(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and

(iii) provide at least one other positive form of picture identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(d) shall be presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(d), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

(a) "Receives" means acquiring possession, control, or title or lending on the security of the property;

(b) "Dealer" means a person in the business of buying or selling goods. 1993

Receiving stolen property — Duties of pawnbrokers [Effective January 1, 2005].

(1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

(2) The knowledge or belief required for Subsection (1) is presumed in the case of an actor who:

(a) is found in possession or control of other property stolen on a separate occasion;

(b) has received other stolen property within the year preceding the receiving offense charged; or

(c) is a pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or an agent, employee, or representative of a pawnbroker or person who buys, receives, or obtains property and fails to require the seller or person delivering the property to:

(i) certify, in writing, that he has the legal rights to sell the property;

(ii) provide a legible print, preferably the right thumb, at the bottom of the certificate next to his signature; and

(iii) provide at least one positive form of identification.

(3) Every pawnbroker or person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee, or representative of a pawnbroker or person who fails to comply with the requirements of Subsection (2)(c) is presumed to have bought, received, or obtained the property knowing it to have been stolen or unlawfully obtained. This presumption may be rebutted by proof.

(4) When, in a prosecution under this section, it appears from the evidence that the defendant was a pawnbroker or a person who has or operates a business dealing in or collecting used or secondhand merchandise or personal property, or was an agent, employee, or representative of a pawnbroker or person, that the defendant bought, received, concealed, or withheld the property without obtaining the information required in Subsection (2)(d), then the burden shall be upon the defendant to show that the property bought, received, or obtained was not stolen.

(5) Subsections (2)(c), (3), and (4) do not apply to scrap metal processors as defined in Section 76-10-901.

(6) As used in this section:

(a) "Dealer" means a person in the business of buying or selling goods.

(b) "Pawnbroker" means a person who:

(i) loans money on deposit of personal property, or deals in the purchase, exchange, or possession of personal property on condition of selling the same property back again to the pledge or depositor;

(ii) loans or advances money on personal property by taking chattel mortgage security on the property and takes or receives the personal property into his possession and who sells the unredeemed pledges; or

(iii) receives personal property in exchange for money or in trade for other personal property.

(c) "Receives" means acquiring possession, control, or title or lending on the security of the property. 200

76-6-409. Theft of services.

(1) A person commits theft if he obtains services which he knows are available only for compensation by deception, threat, force, or any other means designed to avoid the due payment for them.

(2) A person commits theft if, having control over the disposition of services of another, to which he knows he is not entitled, he diverts the services to his own benefit or to the benefit of another who he knows is not entitled to them.

(3) In this section "services" includes, but is not limited to labor, professional service, public utility and transportation services, restaurant, hotel, motel, tourist cabin, roomin house, and like accommodations, the supplying of equipment, tools, vehicles, or trailers for temporary use, telephone or telegraph service, steam, admission to entertainment, exhibitions, sporting events, or other events for which a charge is made.

(4) Under this section "services" includes gas, electricity, water, sewer, or cable television services, only if the service are obtained by threat, force, or a form of deception not described in Section 76-6-409.3.

(5) Under this section "services" includes telephone service only if the services are obtained by threat, force, or a form of deception not described in Sections 76-6-409.5 through 76-6-409.9. 19

76-6-409.1. Devices for theft of services — Seizure and destruction — Civil actions for damages.

(1) A person may not knowingly:

(a) make or possess any instrument, apparatus, equipment, or device for the use of, or for the purpose of committing or attempting to commit theft under Section 76-6-409 or 76-6-409.3; or

(b) sell, offer to sell, advertise, give, transport, or otherwise transfer to another any information, instrument, apparatus, equipment, or device, or any information, plan, or instruction for obtaining, making, or assembling the same, with intent that it be used, or caused to be use

)y his own conduct or that of another for which he is accountable, if:

a) the offense is committed either wholly or partly thin the state;

b) the conduct outside the state constitutes an attempt commit an offense within the state;

(c) the conduct outside the state constitutes a conspir- y to commit an offense within the state and an act in rtherance of the conspiracy occurs in the state; or

(d) the conduct within the state constitutes an attempt, licitation, or conspiracy to commit in another jurisdic-)n an offense under the laws of both this state and the her jurisdiction.

An offense is committed partly within this state if either nduct which is any element of the offense, or the result is an element, occurs within this state.

In homicide offenses, the "result" is either the physical :t which causes death or the death itself.

(a) If the body of a homicide victim is found within the tate, the death shall be presumed to have occurred ithin the state.

(b) If jurisdiction is based on this presumption, this tate retains jurisdiction unless the defendant proves by lear and convincing evidence that:

(i) the result of the homicide did not occur in this state; and

(ii) the defendant did not engage in any conduct in this state which is any element of the offense.

An offense which is based on an omission to perform a imposed by the law of this state is committed within the regardless of the location of the offender at the time of)mission.

(a) If no jurisdictional issue is raised, the pleadings are sufficient to establish jurisdiction.

(b) The defendant may challenge jurisdiction by filing a motion before trial stating which facts exist that deprive the state of jurisdiction.

(c) The burden is upon the state to initially establish jurisdiction over the offense by a preponderance of the evidence by showing under the provisions of Subsections (1) through (4) that the offense was committed either wholly or partly within the borders of the state.

(d) If after the prosecution has met its burden of proof under Subsection (5)(c) the defendant claims that the state is deprived of jurisdiction or may not exercise jurisdiction, the burden is upon the defendant to prove by a preponderance of the evidence:

(i) any facts claimed; and

(ii) why those facts deprive the state of jurisdiction.

3) Facts that deprive the state of jurisdiction or prohibit state from exercising jurisdiction include the fact that the:

(a) defendant is serving in a position that is entitled to diplomatic immunity from prosecution and that the defendant's country has not waived that diplomatic immunity;

(b) defendant is a member of the armed forces of another country and that the crime that he is alleged to have committed is one that due to an international agreement, such as a status of forces agreement between his country and the United States, cedes the exercise of jurisdiction over him for that offense to his country;

(c) defendant is an enrolled member of an Indian tribe, as defined in Section 9-9-101, and that the Indian tribe has a legal status with the United States or the state that vests jurisdiction in either tribal or federal courts for certain offenses committed within the exterior boundaries of a tribal reservation, and that the facts establish that the crime is one that vests jurisdiction in tribal or federal court; or

(d) offense occurred on land that is exclusively within federal jurisdiction.

(7) (a) The Legislature finds that identity fraud under Chapter 6, Part 11, Identity Fraud Act, involves the use of personal identifying information which is uniquely personal to the consumer or business victim of that identity fraud and which information is considered to be in lawful possession of the consumer or business victim wherever the consumer or business victim currently resides or is found.

(b) For purposes of Subsection (1)(a), an offense which is based on a violation of Chapter 6, Part 11, Identity Fraud Act, is committed partly within this state, regardless of the location of the offender at the time of the offense, if the victim of the identity fraud resides or is found in this state.

(8) The judge shall determine jurisdiction. 2004

76-1-202. Venue of actions.

(1) Criminal actions shall be tried in the county, district, or precinct where the offense is alleged to have been committed. In determining the proper place of trial, the following provisions shall apply:

(a) If the commission of an offense commenced outside the state is consummated within this state, the offender shall be tried in the county where the offense is consummated.

(b) When conduct constituting elements of an offense or results that constitute elements, whether the conduct or result constituting elements is in itself unlawful, shall occur in two or more counties, trial of the offense may be held in any of the counties concerned.

(c) If a person committing an offense upon the person of another is located in one county and his victim is located in another county at the time of the commission of the offense, trial may be held in either county.

(d) If a cause of death is inflicted in one county and death ensues in another county, the offender may be tried in either county.

(e) A person who commits an inchoate offense may be tried in any county in which any act that is an element of the offense, including the agreement in conspiracy, is committed.

(f) Where a person in one county solicits, aids, abets, agrees, or attempts to aid another in the planning or commission of an offense in another county, he may be tried for the offense in either county.

(g) When an offense is committed within this state and it cannot be readily determined in which county or district the offense occurred, the following provisions shall be applicable:

(i) When an offense is committed upon any railroad car, vehicle, watercraft, or aircraft passing within this state, the offender may be tried in any county through which such railroad car, vehicle, watercraft, or aircraft has passed.

(ii) When an offense is committed on any body of water bordering on or within this state, the offender may be tried in any county adjacent to such body of water. The words "body of water" shall include but not be limited to any stream, river, lake, or reservoir, whether natural or man-made.

(iii) A person who commits theft may be tried in any county in which he exerts control over the property affected.

(iv) If an offense is committed on or near the boundary of two or more counties, trial of the offense may be held in any of such counties.

(v) For any other offense, trial may be held in the county in which the defendant resides, or, if he has no fixed residence, in the county in which he is apprehended or to which he is extradited.

(b) A person who commits an offense based on Chapter 6, Part 11, Identity Fraud Act, may be tried in the county:

(i) where the victim's personal identifying information was obtained;

(ii) where the defendant used or attempted to use the personally identifying information;

(iii) where the victim of the identity fraud resides or is found; or

(iv) if multiple offenses of identity fraud occur in multiple jurisdictions, in any county where the victim's identity was used or obtained, or where the victim resides or is found.

(2) All objections of improper place of trial are waived by a defendant unless made before trial. 2004

PART 3

LIMITATIONS OF ACTIONS

76-1-301. Offenses for which prosecution may be commenced at any time.

A prosecution for a capital felony, aggravated murder, murder, manslaughter, child abuse homicide which is a second degree felony, aggravated kidnapping, or child kidnapping may be commenced at any time. 2002

76-1-301.5. Time limitations for prosecution of misusing public monies, falsification or alteration of government records, and bribery.

(1) A prosecution for misusing public monies, falsification or alteration of government records, or for a bribery offense shall be commenced within two years after facts constituting the offense have been reported to a prosecutor having responsibility and jurisdiction to prosecute the offense.

(2) This section does not shorten the limitation of actions under Section 76-1-302 or Subsection 76-1-303(3). 2002

76-1-302. Time limitations for prosecution of offenses — Provisions if DNA evidence would identify the defendant — Commencement of prosecution.

(1) Except as otherwise provided, a prosecution for:

(a) a felony or negligent homicide shall be commenced within four years after it is committed;

(b) a misdemeanor other than negligent homicide shall be commenced within two years after it is committed; and

(c) any infraction shall be commenced within one year after it is committed.

(2) (a) A prosecution for the offenses listed in Subsections 76-3-203.5(1)(c)(i)(A) through (P) may be commenced at any time if the identity of the person who committed the crime is unknown but DNA evidence is collected that would identify the person at a later date.

(b) Subsection (2)(a) does not apply if the statute of limitations on a crime has run as of May 5, 2003, and no charges have been filed.

(3) If the statute of limitations would have run but for the provisions of Subsection (2) and identification of a perpetrator is made through DNA, a prosecution shall be commenced within one year of the discovery of the identity of the perpetrator.

(4) A prosecution is commenced upon the finding and filing of an indictment by a grand jury or upon the filing of a complaint or information. 2003

76-1-303. Time limitations for fraud or breach of f ciary obligation and misconduct of pu officer or employee.

(1) If the period prescribed in Section 76-1-302 has exp a prosecution may be commenced for any offense a mat element of which is either fraud or a breach of fiduc obligation within one year after discovery of the offense b aggrieved party or by a person who has a legal dut represent an aggrieved party and who is himself not a part the offense.

(2) Subsection (1) may not extend the period of limitatio provided in Section 76-1-302 by more than three years.

(3) If the period prescribed in Section 76-1-301.5 or 7 302 has expired, a prosecution may be commenced for:

(a) any offense based upon misconduct in office b public officer or public employee:

(i) at any time during which the defendant hol public office or during the period of his public emp ment; or

(ii) within two years after termination of def dant's public office or public employment.

(b) Except as provided in Section 76-1-301.5, Subs tion (3) shall not extend the period of limitation otherw applicable by more than three years. 1

76-1-303.5. Sexual offense against a child.

If the period prescribed in Subsection 76-1-302(1) has pired, a prosecution may nevertheless be commenced for ra of a child, object rape of a child, sodomy upon a child, sexu abuse of a child, or aggravated sexual abuse of a child with four years after the report of the offense to a law enforceme agency. 1

76-1-304. Defendant out of state — Plea held invalid New prosecutions.

(1) The period of limitation does not run against a defendant during any period of time in which the defendant out of the state following the commission of an offense.

(2) If the defendant has entered into a plea agreement wi the prosecution and later successfully moves to invalidate h conviction, the period of limitation is suspended from the ti of the entry of the plea pursuant to the plea agreement un the time at which the conviction is determined to be invali and that determination becomes final.

(3) For purposes of this section, "final" means:

(a) all appeals have been exhausted;

(b) no judicial review is pending; and

(c) no application for judicial review is pending.

(4) When the period of limitation is suspended pursuant Subsection (2), the suspension includes any charges to whic the defendant pleaded guilty pursuant to a plea agreemen charges which were dismissed as a result of a plea agreemen as well as any known charges which were not barred at th time of entry of the plea.

(5) Notwithstanding any other limitation, a prosecutio may be commenced for charges described in Subsection (within one year after a plea entered pursuant to a pl agreement has been determined to be invalid, and that dete mination becomes final. 19

76-1-305. Lesser included offense for which period limitations has run.

Whenever a defendant is charged with an offense for whic the period of limitations has not run and the defendant sho be found guilty of a lesser offense for which the period limitations has run, the finding of the lesser and includ offense against which the statute of limitations has run sh not be a bar to punishment for the lesser offense. 19

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. MARK DUANE WORKMAN, Defendant.	**RULING RE: MOTION TO DISMISS OR QUASH BINDOVER** Case # 001400742 Judge Fred D. Howard Division 2

The above-entitled matter having come before the Court on Defendant's Motion to Dismiss for Improper Venue, or in the Alternative, Motion to Quash Bindover Order; and the Court having carefully considered the Motions and Plaintiff's Responses thereto; and the Court being fully advised in the premises, and good cause appearing, it now make the following Ruling:

Noting the facts relative to the incident in question and submitted authorities; the Court is persuaded by Plaintiff's arguments and authorities which the Court adopts and incorporates in this Ruling. Defendant's Motions, therefore, are respectfully denied.

Dated this 21 day of May 2003.

BY THE COURT:

JUDGE FRED D. HOWARD
District Court Judge

CERTIFICATE OF DELIVERY

I certify that true copies of the foregoing Ruling were delivered on the 21 day of May 2003 to the following in the manner indicated, to wit:

Curtis L. Larson
Utah County Attorney
(by hand)

Thomas H. Means
Utah County Public Defender
(by hand)

Deputy Court Clerk

THOMAS H. MEANS
Utah County Public Defender Association
Attorneys for Defendant
245 North University Avenue
Provo, Utah, 84601
(801)379-2570

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	)	CASE NUMBER: 001400742
Plaintiff,	)	**MOTION DISMISS FOR IMPROPER VENUE or in the alternative MOTION TO QUASH BINDOVER ORDER**
vs.	)	
MARK WORKMAN,	)	Hon. Fred D. Howard
Defendant.	)	

Comes Now, Defendant, Mark Workman, by and through his attorney of record, Thomas H. Means, and pursuant to the 6th Amendment to the Constitution of the United States, Article I §12 of the Constitution of Utah and §76-1-202, Utah Code, who hereby respectfully moves for this Court's Order that this matter be dismissed for reason of lack of venue in Utah County, or in the alternative that this Court quash the Bindover Order previously issued after the preliminary examination conducted in this matter, also for the reason that venue is not proper in Utah County.

FACTS

Defendant asserts that the facts relevant to this motion are as follows:

1. Defendant is charged by the Utah County Attorney with THEFT BY RECEIVING STOLEN PROPERTY, a Second Degree Felony, alleging that Defendant, on or about 7 January, 2000, received, retained, or disposed of an automobile belonging to another, knowing that the property had been stolen, or believing that the property probably had been stolen, or that he concealed, sold, or withheld the property or that he aided in concealing, selling, or withholding the property also knowing that the property had been stolen or believing that the property probably had been stolen, intending to deprive the owner thereof.

2. At the time of the alleged offense, the filing of the Information, the preliminary examination, and presently Defendant has and does reside in Salt Lake County.

3. At the preliminary examination held in this matter, Detective Todd Mallinson testified for the State substantially as follows (a transcript of the preliminary examination is in the file of this matter):

a. Detective Mallinson first observed a car in Orem City, Utah County at a 7-11 and eventually stopped the car on I-15 in Utah; it was being driven by Holly Armstrong; through a check with dispatch the car was reported stolen; Tr. 7:17 through 13:2.

b. On information gained from the driver, Detective Mallinson called Defendant by telephone, presumably at his residence in Murray, Salt Lake County; during said call Defendant allegedly made statements that he had been in possession of the car in Salt Lake County and had loaned the car to Holly Armstrong in Salt Lake County; Tr. 13:3 through 14:13.

c. On cross examination, Detective Mallinson indicated that Ms. Armstrong told him she had picked up the car at Defendant's residence in Salt Lake County at about 5:00pm the day before; that she had gone to a party and had stopped at a 7-11 where the officer had first seen her to call Defendant to tell him she didn't want to go back to Salt lake County that she wanted to keep the car.

LAW

1. The 6th Amendment to the Constitution of the United States(made applicable to State actions by the 14th Amendment) provides that the Defendant "shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law[.]"

2. Article I, §12 of the Utah Constitution provides that the Defendant shall "have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed[.]"

3. To implement these two constitutional guarantees §76-1-202 provides certain rules of venue. Sub-section 76-1-202(1)(b) provides that when elements of the offense occur in more than one county trial may be held in either county. Subsection 76-1-202(g)(iii) is more particular to the crime of theft and provides that "[a] person who commits theft may be tried in any county in which he exerts control over the property affected."

ARGUMENT

Taken in the light most favorable to the State the evidence admitted at the preliminary examination established that Defendant may have retained and disposed of the automobile in Salt Lake County. No evidence was admitted that established that the Defendant did so in Utah County or aided another in doing so. While the evidence established that Ms. Armstrong retained the vehicle within Utah County, her actions cannot be attributed to the Defendant.

First, the evidence established that Defendant completed any retention or disposing of the car in Salt Lake County on the 6th of January. At the time that possession of the vehicle was transferred from the Defendant to Ms. Armstrong on the evening of the 6th, Defendant ceased to retain the vehicle and had completed the act of disposing of the vehicle, all within Salt Lake County. If after disposing of the vehicle to Ms. Armstrong it can be said that Defendant also continued to retain the vehicle, the term "dispose" would have no meaning in the statute. This would violate the rule of statutory construction that all terms of a statute are presumed to have been used advisedly by the legislature. See *Board of Education of Granite*

School District v Salt lake County, 659 P.2d 1030 1035 (Utah, 1983). Therefore, all of the elements of theft by receiving that have been alleged against Defendant occurred in Salt Lake County, only.

The evidence established that Ms. Armstrong's decisions to commit some elements of her own retention of the vehicle in Utah County were her independent actions based on her own independent decisions, not aided encouraged or directed by the Defendant. No evidence established that Defendant directed or even knew that Ms. Armstrong would bring the vehicle into Utah County. Defendant was not present with the car in Utah County and had no nexus to the car in Utah County. Ms. Armstrong's retention was therefore her own separate act.

Second, the more specific section of the venue statute (76-1-202(g)(iii)) directs that the trial of the charges against Defendant be held where "he exerts control over the property affected." An excepted precept of statutory construction is that specific provisions of law take precedent over more general provisions. *Southern Utah Wilderness Alliance v Board of State Lands and Forestry*, 830 P.2d 233, 235 (Utah, 1992). Consequently, sub-section (1)(g)(iii) which is specific to crimes of theft must

take precedence over sub-section (1)(b) which is general in application. As stated above, the evidence presented at the preliminary examination established only that Defendant exerted control over the vehicle in Salt Lake County at which place he handed over control to Ms. Armstrong. In contrast, no evidence established that Defendant aided Ms. Armstrong in the control she independently exerted over the car in Utah County, such as directions to her to take the car to Utah County, agreeing with her that she could take the car to Utah County, being with her while she took the car to Utah County, jointly controlling the car with her in Utah County.

CONCLUSION

The State may have established that Defendant completed an act of receiving, retaining, or disposing of the stolen car in Salt lake County. The State did not present any evidence from which the magistrate could have concluded that Defendant personally received, retained, or disposed of the car in Utah County. Neither did the State establish probable cause to conclude that Defendant aided Ms. Armstrong in her independent act of retaining the car in Utah County first because there was no evidence to establish that Defendant had knowledge of or

encouraged her in bringing the car to Utah County. And, second, and more importantly, the specific requirement that Defendant exerted control over the car in Utah County was not established because State established that Defendant had already disposed of the car (therefore culminating his control over the car) in Salt Lake County.

Therefore Defendant moves for this Court's order that this matter be dismissed for lack of venue to try this Defendant in Utah County or alternatively, that this Court quash the Bindover order of the magistrate also for the reason that the State failed to establish at the preliminary examination that Defendant's alleged crime occurred in Utah County.

Dated this 10TH day of April, 2003.

Thomas H. Means
Attorney for Defendant

CERTIFICATE OF DELIVERY/MAILING

I hereby certify that on the 17 day of April, 2003, I hand-delivered or mailed, with postage pre-paid, a copy of the foregoing to the following:

Kay Bryson
Utah County Attorney
100 East Center
Suite 2100
Provo, Utah, 84601

KAY BRYSON #0473
Utah County Attorney
CURTIS L. LARSON #6598
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100 East Center, Suite 2100
Provo, UT 84606
(801) 370-8026

IN THE FOURTH DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS OR QUASH BIND-OVER**
vs.	:	
MARK WORKMAN	:	**Case No. 001400742**
Defendant(s).	:	**JUDGE FRED D. HOWARD**

COMES NOW PLAINTIFF, by and through its counsel of record Curtis L. Larson, and responds to Defendant's Motion to Dismiss, or in the alternative, Quash the Bind-Over as follows:

PERTINENT FACTS

1. State stipulates to the facts presented by the defendant in his motion that are based upon the record of the Preliminary Hearing.
2. That State submits the following additions to the facts which were brought forward at the Preliminary Hearing:
   a. Defendant "loaned" the car to Armstrong.
   b. Defendant received a call from Armstrong, in Utah

County, detailing her desire not to return the car to him that night, but keep it in Utah County.

c. It is unsure where the defendant was at the time of this call: He could have been in Salt Lake, or Utah County.

d. That the defendant received a call from the officer, who was in Utah County with the vehicle, and was asked questions regarding the vehicle: Again it was unknown at the time of the call where the defendant was as he was on a cellphone.

e. That the defendant declared his ownership of the vehicle to the officer, while it was sitting, in police custody, in Utah County.

f. That the title defendant claimed to the vehicle, and located in the vehicle, was to a completely different vehicle.

g. That the defendant paid $900 down, on a $3600 purchase price for a vehicle that was valued at $9,282.00.

VENUE ARGUMENT

State's counsel has reviewed his arguments made at the conclusion of the Preliminary Hearing (Tr. 21:6 - 22:19, and 24:9 - 25:14), and, believing them to be well-found, and articulate, re-iterates them through their incorporation into this response.

The Statute in question in defendant's motion is 76-1-202. It states in pertinent part:

> (1) Criminal actions shall be tried in the county, district, or precinct where the offense is alleged to have been committed. In determining the proper place of trial, the following provisions shall apply: . . .
>
> (b) When conduct constituting elements of an offense or results that constitute elements, whether the conduct or result constituting elements is in itself unlawful, shall occur in two or more counties, trial of the offense may be held in any of the counties concerned. . . .
>
> (g) When an offense is committed within this state and it cannot be readily determined in which county or district the offense occurred, the following provisions shall be applicable: . . . (iii) A person who commits theft may be tried in any county in which he exerts control over the property affected.

In *State* v. *Mitchell*, 3 Utah 2d 70, 278 P.2d 618 (1955), the court held that venue was not an element of the offense of murder, so it was sufficient that proof of venue be by a "preponderance of the evidence." This is very low standard, and is demonstrated in *State* v *Green*, 89 Utah 437, 57 P2d 750 (1936). In *Green*, the court found *prima facia* proof of proper venue when a witness simply had the "impression" that a certain place was in "Salt Lake County."

In *State* v. *Cauble*, 563 P.2d 775 (Utah 1977), the court directed that in determining the proper place of trial, *where two or more counties are involved, the venue statute provides that trial may be held in any of the counties in which the conduct constitutes the elements of the offense charged.*

In *Cauble*, the defendant obtained possession of a check in a business transaction, and formulated the intent to deprive the owner thereof, in Utah County. He then took the check to Salt Lake County and deposited it in a bank account. Defendant was charged and tried in Utah County. On appeal the defendant argued that Utah County was not the proper venue, as the actual unauthorized control of the check was in Salt Lake County. The court held:

> The elements of theft under the Utah Code are that appellant (1) obtained or exercised unauthorized control over another's property, and (2) that he had a purpose to deprive the owner of the property. . . .
>
> The most difficult question arises as to *when* appellant's control over the money became unauthorized -- when he received the check into his possession at the time the sale was made in Utah County, or when he deposited the check into his personal account at Tracy-Collins Bank in Salt Lake County. Appellant claims that he was authorized to accept money on behalf of Western Leisure and, therefore, no crime could have occurred until the property was actually converted to his own use at the Salt Lake bank. The record does not support this contention. . . .
>
> It seems clear that when appellant formed the intent in Utah County to keep the proceeds from the Wheelwright sale; when he failed to deliver the check to Mrs. Peterson; and, further, when he failed to notify the company that a sale had even been made, that the elements of the offense were well established by his conduct at that point in time, and therefore meet the statutory requirement. . . .
>
> Appellant has contended that the unlawful conduct did not occur until the bank in Salt Lake City accepted the check from him. Banking practices can be used as one measure to determine when and where the crime was technically committed, and we find authority to support the view that since a bank does not recognize a transaction as complete until final payment from the originating bank is cleared, an

> offense of embezzlement is begun in the county where the check is drawn and completed in the county where it is ultimately paid. In the instant case, the check in question originated in Utah County and was ultimately paid there.
>
> Regardless of the standard applied herein, the conduct of appellant which constitutes the elements of the offense is found to have occurred to a substantial degree in Utah County. We find that venue was properly laid in Utah County. . . . [Footnotes and Citations omitted.]

Similar to the circumstances in *Cauble*, presumably, the defendant took possession of the vehicle, and formed the intent to permanently deprive the owner thereof on Salt Lake County. He then retained possession of that stolen vehicle in Utah County by his exercising authority over it in a telephone conversation with Holly Armstrong, and the Officer. He indicated he was the owner of the vehicle, and had loaned it to Armstrong. As he loaned the car to Armstrong, he exerted possessory rights to it in Utah County, or wherever else she went, as he expected her to bring it back, which is evidenced by the fact that she would call him from Utha County to gain an extension of the time for return. To our knowledge, Armstrong was never encouraged to return the vehicle to the rightful owner, but only to the person whom she recognized as such—which was the defendant.

Defendant argues the need for defendant's "actual physical control" of the vehicle: That "he" had to be in the vehicle in Utah County at the time of the stop. State disagrees and has previously in argument indicated that the courts readily accept the concept of "constructive possession." *State* v *Lyman*, 1999 UT

79. State renews the applicability of this argument.

Applying the "preponderance" standard as espoused in *Mitchell, supra.*, the State has met its burden of showing that venue in this matter is correct with the 4th District Court. Therefore, the defendant's motion to dismiss based upon improper venue should be denied.

QUASH BIND-OVER ARGUMENT

The defendant argues that as the State filed to provide a showing of proper venue, the bind-over should be dismissed. He argues it in the alternative, however the state does not see it as an argument in the alternative as it is part and parcel of venue argument. Should the Court decide that venue was established, than the bind-over was, and remains, correct, and this matter should go further to trial.

Similar to requirement for establishing venue, the courts have held that the standard for bind-over is a "preponderance" of the evidence, as viewed in light of all inferences being drawn in favor of the State. Most recently, the Supreme Court of Utah decided the case of *State* v *Clark*, 2001 UT 9. In that case the court delineated the standard of proof required at a preliminary hearing. It stated:

> [W]e hold that the quantum of evidence necessary to support a bind-over is less than that necessary to survive a directed verdict motion. Specifically, we see no principled basis for attempting to maintain a distinction between the

> arrest warrant probable cause standard and the preliminary hearing probable cause standard. Our efforts to articulate a standard that is more rigorous than the arrest warrant standard and is still lower that a preponderance of the evidence standard have only resulted in confusion. Therefore, at both the arrest warrant and the preliminary hearing stages, the prosecution must present sufficient evidence to support a reasonable belief that an offense was committed and that the defendant committed it. [Citation and footnote omitted.] This "reasonable belief" standard has the advantage of being more easily understood while still allowing the magistrates to fulfill the primary purpose of the preliminary hearing, "ferreting out . . . groundless and improvident prosecutions." [Citation omitted.] *Clark* at ¶16.

In *State* v *Pledger*, 896 P.2d 1226 (Utah 1995), the Supreme Court of Utah instructed:

> Preliminary hearings are adversarial proceedings in which the prosecution must present sufficient evidence to establish that "the crime charged has been committed and that the defendant has committed it." Utah R. Crim. P. 7(h)(2). "The prosecution is not required to introduce enough evidence to establish the defendant's guilt beyond a reasonable doubt, but must present a quantum of evidence sufficient to warrant submission of the case to the trier of fact." Anderson, 612 P.2d at 783. In making a determination as to probable cause, the magistrate should view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution. People v. District Court, 779 P.2d 385, 388 (Colo. 1989) (en banc); State v. Starks, 249 Kan. 516, 820 P.2d 1243, 1246 (Kan. 1991); see also Diaz v. State, 728 P.2d 503, 510 (Okla. Crim. App. 1986) ("There is a presumption that the State will strengthen its evidence at trial."). Moreover, "unless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim," the magistrate should bind the defendant over for trial. Cruz v. Montoya, 660 P.2d 723, 729 (Utah 1983) (setting out standard for directed verdict in civil case). *Pledger*, 896 P.2d at 1229. [Emphasis added.]

In *State* v *Talbot*, 356 Utah Adv. Rep. 14 (Utah 1998) the Utah State Supreme Court directed:

> [P]ertinent to the standard for establishing probable cause at a preliminary hearing [are]: (i) the quantum of the evidence required to establish probable cause; (ii) the extent of the magistrate's freedom to review the credibility of evidence presented at the hearing; and (iii) the limitations on a magistrate's ability to choose between credible but conflicting evidence. *Talbot*, 356 Utah Adv. Rep. at 15.

Continuing, the court re-affirmed:

> This is not a trial on the merits, only a gateway to the finder of fact. Therefore, "the magistrate should view the evidence in a light most favorable to the prosecution and resolve all inferences in favor of the prosecution." Pledger, 896 P.2d at 1229. *Talbot*, 356 Utah Adv. Rep. at 15.

In this matter, the statute in play is Section 76-6-408(1), Utah Code Annotated, 1953 as amended, which details the elements of the offense:

> (1) A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it probably has been stolen, or who conceals, sells, withholds or aids in concealing, selling, or withholding the property from the owner, knowing the property to be stolen, intending to deprive the owner of it.

In this case, the evidence introduced at Preliminary Hearing show that the defendant committed the alleged crime of Receiving Stolen Property in Utah County. Based upon the evidence in this matter, the jury can appropriately draw a conclusion that the defendant committed the crime charged.

In the preliminary hearing, the magistrate is only making a limited determination that probable cause exists which warrants submission of the case to the trier of fact. According the

supreme court, this is "a reasonable belief that an offense was committed and that the defendant committed it." *Clark* at ¶16. And, "[t]his probable cause standard 'is lower, even, than a preponderance of the evidence standard applicable to civil cases.'" *Talbot*, 356 Utah Adv. Rep. at 15, *Anderson*, 612 P2d at 783. "[U]nless the evidence is wholly lacking and incapable of reasonable inference to prove some issue which supports the [prosecution's] claim," the magistrate should bind the defendant over for trial. *Pledger*, supra, quoting, *Cruz* v *Montoya*, supra.

Further "[t]he prosecution is not required to introduce enough evidence to establish the defendant's guilt beyond a reasonable doubt, but must present a quantum of evidence sufficient to warrant submission of the case to the trier of fact." *State* v *Anderson*, *supra*.

The state maintains it has presented the quantum of evidence necessary to satisfy it's burden of proof at a Preliminary Hearing to establish that the crime charge was committed, and that the defendant committed it.

CONCLUSION

The statute in issue makes this court the proper venue for this offense. The fact that it could have been brought in Salt Lake County does not defeat the venue of this court. The State has provided the sufficient preponderance of evidence necessary

for the bind-over order.

Plaintiff requests the court deny Defendant's Motion to Dismiss, or in the alternative, Quash of Bind-Over Order, for the foregoing reasons.

Respectfully submitted this 17th day of April, 2003.

Curtis L. Larson
Deputy Utah County Attorney

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this Response to Defendant's Motion to Dismiss or Quash Bind-Over, via US/Inter-Office, Mail, this 17th day of April, 2003, on

Mr. Tom Means
PD Office